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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

SHENZHEN SMOORE
TECHNOLOGY CO. LTD.,

Plaintiff,

v.

NEXT LEVEL VENTURES, LLC,
and ADVANCED VAPOR DEVICES
LLC

Defendants.

Case No. 2:22-cv-07646-AB-AGR

**AMENDED ANSWER, AFFIRMATIVE
DEFENSES, AND COUNTERCLAIMS
TO COMPLAINT FOR PATENT
INFRINGEMENT**

DEMAND FOR JURY TRIAL

**AMENDED ANSWER AND AFFIRMATIVE DEFENSES TO COMPLAINT
FOR PATENT INFRINGEMENT AND AMENDED COUNTERCLAIMS OF
DEFENDANT NEXT LEVEL VENTURES, LLC**

Defendant Next Level Ventures, LLC, (“NLV” or “Defendant”)¹ by and through its undersigned counsel, hereby answer Plaintiff Shenzhen Smoore Technology Co. Ltd.’s (“Smoore”) Complaint for Patent Infringement (“Complaint”) and asserts amended counterclaims and affirmative defenses.

¹ Next Level Ventures LLC is currently registered to do business as ACTIVE, and formerly conducted business as Advanced Vapor Devices/AVD.

NATURE OF THE ACTION

1
2 1. NLV admits this case purports to be an action for patent infringement.
3 NLV denies that Plaintiff has stated a legally sufficient claim for patent infringement,
4 and further specifically denies any infringement. NLV admits that Exhibit A to the
5 Complaint purports to provide copies of U.S. Patent Nos. 10,791,762 (“’762 Patent”),
6 10,791,763 (“’763 Patent”), D817,544 (“D544 Patent”), D823,534 (“D534 Patent”),
7 and D853,635 (“D635 Patent”)(collectively, the “Patents-in-Suit”). NLV denies the
8 remaining allegations set forth in Paragraph 1 of the Complaint.

PARTIES

9
10 2. NLV lacks knowledge or information sufficient to form a belief as to
11 the truth of the allegations set forth in Paragraph 2 of the Complaint and therefore
12 denies these allegations.

13 3. NLV admits that it is a Washington state limited liability company with
14 a principal office street address at 3131 Western Ave., Ste. 325, Seattle, WA 38121.
15 NLV further admits that A&A Global Imports Inc. has been a distributor. NLV
16 denies the remaining allegations set forth in Paragraph 3 of the Complaint.

JURISDICTION AND VENUE

17
18 4. Paragraph 4 states a legal conclusion to which no response is necessary.
19 To the extent a response is required, NLV admits that Smoore purports this to be an
20 action for patent infringement arising under the patent laws of the United States, 35
21 U.S.C. §§ 1, *et seq.*

22 5. Paragraph 5 states a legal conclusion to which no response is necessary.
23 To the extent a response is required, NLV does not contest subject matter jurisdiction
24 pursuant to 28 U.S.C. §§ 1331 and 1338(a), to the extent Smoore purports to bring a
25 civil action arising under the patent laws of the United States.

26 6. For this matter only, NLV does not contest that this Court has personal
27 jurisdiction over NLV. In all other respects, NLV denies the remaining allegations
28 set forth in Paragraph 6 of the Complaint.

1 including independent claims 1 and 11, and dependent claims 2-10, 12-20. NLV
2 admits that Smoore is asserting claims 1 and 11. NLV denies the remaining
3 allegations set forth in Paragraph 12 of the Complaint, and specifically denies any
4 infringement, literally or under the doctrine of equivalents.

5 **C. The D544 Patent**

6 13. NLV admits that U.S. Patent No. D817,544 (the “D544 Patent”),
7 entitled “Atomizer for electronic cigarette” identifies May 8, 2018, as a date of patent.
8 NLV admits that Exhibit A to the Complaint provides a purported copy of the D544
9 Patent. NLV denies the remaining allegations set forth in Paragraph 13 of the
10 Complaint.

11 14. NLV admits that Smoore asserts that the D544 Patent has 1 claim. NLV
12 admits that Smoore is asserting this claim. NLV denies the remaining allegations set
13 forth in Paragraph 14 of the Complaint, and specifically denies any infringement,
14 literally or under the doctrine of equivalents.

15 **D. The D534 Patent**

16 15. NLV admits that U.S. Patent No. D823,534 (the “D534 Patent”),
17 entitled “Atomizer for electronic cigarette” identifies July 17, 2018, as a date of
18 patent. NLV admits that Exhibit A to the Complaint provides a purported copy of
19 the D534 Patent. NLV denies the remaining allegations set forth in Paragraph 15 of
20 the Complaint.

21 16. NLV admits that Smoore asserts that the D534 Patent has 1 claim. NLV
22 admits that Smoore is asserting this claim. NLV denies the remaining allegations set
23 forth in Paragraph 16 of the Complaint, and specifically denies any infringement,
24 literally or under the doctrine of equivalents.

25 **E. The D635 Patent**

26 17. NLV admits that U.S. Patent No. D853,635(the “D635 Patent”), entitled
27 “Atomizer for electronic cigarette” identifies July 9, 2019, as a date of patent. NLV
28 admits that Exhibit A to the Complaint provides a purported copy of the D635 Patent.

1 NLV denies the remaining allegations set forth in Paragraph 17 of the Complaint.

2 18. NLV admits that Smoore asserts that the D635 Patent has 1 claim. NLV
3 admits that Smoore is asserting this claim. NLV denies the remaining allegations set
4 forth in Paragraph 18 of the Complaint, and specifically denies any infringement,
5 literally or under the doctrine of equivalents.

6 19. NLV lacks knowledge or information sufficient to form a belief as to
7 the truth of the allegations set forth in Paragraph 19 of the Complaint, and therefore
8 denies these allegations.

9 **DEFENDANTS' PRODUCTS**

10 20. NLV admits that it sells oil-vaping cartridges. NLV admits that Exhibit
11 B attached to the Complaint contains claim charts. NLV denies that any of their
12 products in the United States infringe the '762 Patent, '763 Patent, D544 Patent,
13 D534 Patent, and/or D635 Patent, or that any of their products practice the identified
14 claims. NLV denies the remaining allegations in Paragraph 20 of the Complaint.

15 21. NLV admits that Smoore identifies AVD C1 Polyresin Oil Cartridges,
16 AVD C2 Glass Oil Cartridges, AVD C3 Eazy-Press Oil Cartridges, AVD C4 All
17 Ceramic Oil Cartridges, and GoodCarts Eazy-Press Glass Oil Cartridges as Accused
18 Products.

19 **COUNT I: INFRINGEMENT OF THE '762 PATENT**

20 22. NLV incorporates and realleges their answers to Paragraphs 1-21.

21 23. Paragraph 23 of the Complaint states a legal conclusion to which no
22 response is necessary. To the extent a response is necessary, NLV denies that they
23 are required to have a license or other authorization from Smoore to make, test, use,
24 offer for sale, sell, or import any of NLV's products.

25 24. Denied.

26 25. Denied.

27 26. Denied.

28 27. Denied.

1 28. Denied.

2 29. Paragraph 29 of the Complaint states a legal conclusion to which no
3 response is necessary. To the extent a response is required, denied.

4 **COUNT II: INFRINGEMENT OF THE '763 PATENT**

5 30. NLV incorporates and reallege their answers to Paragraphs 1-29.

6 31. Paragraph 31 of the Complaint states a legal conclusion to which no
7 response is necessary. To the extent a response is necessary, NLV denies that they
8 are required to have a license or other authorization from Smoore to make, test, use,
9 offer for sale, sell, or import any of NLV's products.

10 32. Denied.

11 33. Denied.

12 34. Denied.

13 35. Denied.

14 36. Denied.

15 37. Paragraph 37 of the Complaint states a legal conclusion to which no
16 response is necessary. To the extent a response is required, denied.

17 **COUNT III: INFRINGEMENT OF THE D544 PATENT**

18 38. NLV incorporates and reallege their answers to Paragraphs 1-37.

19 39. Paragraph 39 of the Complaint states a legal conclusion to which no
20 response is necessary. To the extent a response is necessary, NLV denies that they
21 are required to have a license or other authorization from Smoore to make, test, use,
22 offer for sale, sell, or import any of NLV's products.

23 40. Denied.

24 41. Denied.

25 42. Denied.

26 43. Denied.

27 44. Denied.

28 45. Paragraph 45 of the Complaint states a legal conclusion to which no

1 response is necessary. To the extent a response is required, denied.

2 **COUNT IV: INFRINGEMENT OF THE D534 PATENT**

3 46. NLV incorporates and reallege their answers to Paragraphs 1-45.

4 47. Paragraph 47 of the Complaint states a legal conclusion to which no
5 response is necessary. To the extent a response is necessary, NLV denies that they
6 are required to have a license or other authorization from Smoore to make, test, use,
7 offer for sale, sell, or import any of NLV's products.

8 48. Denied.

9 49. Denied.

10 50. Denied.

11 51. Denied.

12 52. Denied.

13 53. Paragraph 53 of the Complaint states a legal conclusion to which no
14 response is necessary. To the extent a response is required, denied.

15 **COUNT V: INFRINGEMENT OF THE D635 PATENT**

16 54. NLV incorporates and reallege their answers to Paragraphs 1-53.

17 55. Paragraph 55 of the Complaint states a legal conclusion to which no
18 response is necessary. To the extent a response is necessary, NLV denies that they
19 are required to have a license or other authorization from Smoore to make, test, use,
20 offer for sale, sell, or import any of NLV's products.

21 56. Denied.

22 57. Denied.

23 58. Denied.

24 59. Denied.

25 60. Denied.

26 61. Paragraph 61 states a legal conclusion to which no response is
27 necessary. To the extent a response is required, denied.

DEMAND FOR JURY TRIAL

62. NLV also demands a trial by jury on any and all causes of action so triable.

PRAYER FOR RELIEF

NLV denies that Smoore has a right to any relief in this action. NLV requests entry of judgment in NLV's favor, and against Smoore on all requests stated in the Complaint.

AFFIRMATIVE DEFENSES

Further answering the Complaint and as additional defenses thereto, NLV asserts the following defenses. NLV does not intend to assume the burden of proof with these matters as to which, pursuant to law, Smoore bears the burden. NLV reserves the right to add additional defenses and/or supplement its defenses, including (but not limited to) those related to unenforceability based upon inequitable conduct, as NLV learns additional facts. NLV reserves the right to assert all affirmative defenses under Rule 8(c) of the Federal Rules of Civil Procedure, the patent laws of the United States, and any other defense, at law or in equity, that may now exist or in the future be available based upon discovery and further investigation in this case.

FIRST DEFENSE

(NONINFRINGEMENT)

NLV has not infringed and does not infringe, directly, indirectly, literally, or under the doctrine of equivalents, any valid, enforceable claim of any of the Patents-in-Suit. Further, Smoore is precluded under the doctrines of disclaimer and prosecution history estoppel from broadening the scope of any claim of the Patents-in-Suit to encompass any NLV product.

SECOND DEFENSE

(INVALIDITY, UNENFORCEABILITY, OR INELIGIBILITY)

The claims of each of the Patents-in-Suit are invalid, ineligible, unenforceable, or void for failure to satisfy one or more of the requirements of patentability set forth in

1 Title 35 of the United States Code, including, but not limited to, 35 U.S.C. §§ 101,
2 102, 103, 112, and/or 171.

3 **THIRD DEFENSE**

4 **(PROSECUTION HISTORY ESTOPPEL/DISCLAIMER)**

5 By reason of statements, representations, admissions, concessions, arguments,
6 omissions, and/or amendments made by and/or on behalf of the applicants during the
7 prosecution of the patent applications that led to the issuance of the Patents-in-Suit,
8 Smoore's claims of patent infringement are barred, in whole or in part, by the doctrine
9 of prosecution history estoppel and/or disclaimer.

10 **FOURTH DEFENSE**

11 **(EQUITABLE DEFENSES)**

12 Smoore's claims are barred, in whole or in part, under principles of equity, including
13 but not limited to the doctrines of waiver, implied waiver, estoppel, equitable
14 estoppel, acquiescence, and/or unclean hands.

15 **FIFTH DEFENSE**

16 **(STATUTORY LIMITATION ON DAMAGES)**

17 Smoore's claims for damages and/or costs is statutorily limited by 35 U.S.C. §§ 286,
18 287, and/or 288. Without limitation, any claim for damages by Smoore is limited by
19 35 U.S.C. § 287 to only those damages occurring after proper and sufficient notice
20 of alleged infringement of the Patents-in-Suit to NLV. Any claim for pre-lawsuit
21 damages is barred, in whole or in part, for failure to comply with the marking and
22 notice requirements of 35 U.S.C. § 287.

23 **SIXTH DEFENSE**

24 **(EXPRESS LICENSE, IMPLIED LICENSE, PATENT EXHAUSTION, AND**
25 **SINGLE-RECOVERY RULE)**

26 To the extent the evidence so warrants, Smoore's claims are barred, in whole or in
27 part, by express license agreements and/or under the doctrines of implied license,
28 patent exhaustion, or single-recovery rule. For example, and without limitation,

1 Smoore's claims for damages for alleged infringement would be limited or entirely
2 foreclosed to the extent that allegedly infringing components and/or products are
3 supplied, directly or indirectly, to NLV by an entity or entities having a license to
4 any of the Patents-in-Suit. Additionally, Smoore's claims for patent infringement are
5 precluded in whole or in part by direct or implied licenses and/or covenants not to
6 sue that pertain to NLV's or prior assignees' affiliations with any defensive patent
7 trust.

8 **SEVENTH DEFENSE**
9 **(NO WILLFUL INFRINGEMENT)**

10 Smoore is not entitled to enhanced or increased damages for willful infringement
11 because NLV has not engaged in any conduct that meets the applicable standard for
12 willful infringement.

13 **EIGHTH DEFENSE**
14 **(NO EXCEPTIONAL CASE)**

15 Smoore cannot prove that this is an exceptional case justifying an award of attorneys'
16 fees against NLV pursuant to 35 U.S.C. § 285.

17 **NINTH DEFENSE**
18 **(ENSNAREMENT)**

19 Smoore cannot assert its claims under the doctrine of equivalents because any such
20 asserted claim scope would encompass or ensnare the prior art.

21
22 NLV's investigation of its defenses is ongoing. To the extent Smoore seeks further
23 information regarding these defenses, Smoore may seek such information through
24 discovery. NLV expressly reserves the right to amend this Answer to allege and
25 assert any additional defenses, at law or in equity, that may exist now or may be
26 available in the future based on discovery and further investigation in this action.
27
28

1 **AMENDED COUNTERCLAIMS**

2 Pursuant to Federal Rule of Civil Procedure 13, Defendant and Counterclaim-
3 Plaintiff Next Level Ventures, LLC (“NLV”), by way of counterclaims against
4 Plaintiff and Counterclaim-Defendant Shenzhen Smoore Technology Co., Ltd.
5 (“Smoore”), allege as follows:

6 **NATURE OF COUNTERCLAIMS**

7 1. NLV’s counterclaims seek declaratory relief, damages, and injunctive
8 relief that arise: (i) under the patent laws of the United States, 35 U.S.C. §§ 1, *et seq.*;
9 and (ii) federal antitrust laws, 15 U.S.C. §§ 1, 2, and 1125.

10 **THE PARTIES**

11 2. Counterclaim-Plaintiff NLV is a Washington state limited liability
12 company with a principal office street address at 3131 Western Ave., Ste. 325,
13 Seattle, WA 98121. NLV currently conducts business under the name ACTIVE, and
14 formerly conducted business as Advanced Vapor Devices and AVD, all of which are
15 registered names in California and/or Washington.

16 3. Based on the Complaint, Counterclaim-Defendant Smoore is a
17 corporation organized under the laws of China having its principal place of business
18 at Block 16, Dongcai Industry Park, Gushu Village, Bao’an District, Shenzhen,
19 China.

20 **JURISDICTION AND VENUE**

21 4. These counterclaims arise under the patent laws of the United States, 35
22 U.S.C. § 1 *et seq.*, the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*,
23 and Federal Antitrust Laws, 15 U.S.C. §§ 1, 2, and 1125.

24 5. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331
25 (federal question), 1337 (commerce and antitrust regulations), 1338(a) (any Act of
26 Congress related to patents), 1367(a) (supplemental jurisdiction), and 15 U.S.C. § 15
27 (suits by persons injured).

28 6. This Court has personal jurisdiction over Smoore because it has

1 committed and continues to commit acts of infringement in violation of 35 U.S.C. §
2 271 and places infringing products into the stream of commerce, including in this
3 District. The acts by Smoore cause injury to NLV within this District. Upon
4 information and belief, Smoore derives substantial revenue from the sale of
5 infringing products within this District, and derives substantial revenue from
6 interstate and international commerce.

7 7. By filing this instant action, Smoore has consented to personal
8 jurisdiction and venue.

9 8. Venue is proper in this District under 15 U.S.C. §§ 15 and 22, and under
10 28 U.S.C. §§ 1391(b) and (c) and 1400(b) because Smoore has committed acts of
11 infringement and has a regular and established place of business in this district.

12 **ANTITRUST COUNTERCLAIMS SUMMARY**

13 9. The patent claims Smoore asserts here are merely the latest salvo in
14 Smoore's years-long battle to unlawfully restrain competition in, and maintain a
15 dominant share of, the relevant product market for closed cannabis oil vaporizer
16 systems and components,² a market in which Smoore struggles to effectively compete
17 for several reasons, including Chinese anti-cannabis law.³ Because Cannabis is
18 illegal in China,⁴ Smoore, a Chinese company, struggled for years to develop

19 ² The market for Closed Cannabis Oil Vaporizer Systems and Components is a
20 hardware market. Both NLV and Smoore compete in this market. Closed Cannabis
21 Oil Vaporizer Systems generally consist of a mouthpiece, a reservoir, and atomizer
22 assembly. These products are sold by Smoore and NLV to cannabis oil producers
either in their assembled form, or occasionally disassembled in their component

23 ³ Smoore's Complaint admits that it participates in the market for closed
24 cannabis oil vaporizer systems and components, as Smoore alleges that at least any
25 manufacturer selling such systems or components in a 'not-yet-assembled' form
26 (mouthpiece, reservoir, and atomizer assembly), would infringe upon Smoore's
design patents. Complaint ¶¶ 51, 59. The Closed Cannabis Oil Vaporizer Systems
and Components market may for convenience hereinafter be referred to as the
"Closed Cannabis Vaporizer Systems Market," the "Cannabis Vaporizer Market" or
other similar terms. No substantive change to the market definition is intended.

27 ⁴ Chinese law is so strict on this point that Smoore's Annual reports do not
28 include the word "Cannabis." Rather, Smoore euphemistically uses the phrase
"vaping products for special purpose" rather than admit that it is involved in the
closed cannabis oil vaporizer and components market. *See Smoore Holdings Annual*

1 knowledge of cannabis products, perform research and development with cannabis
2 oils, and understand the United States cannabis market in the ways required to deliver
3 superior closed cannabis oil vaporizer system technology.

4 10. Unable to compete on the merits, Smoore resorted to a variety of anti-
5 competitive and illegal tactics in an effort to maintain its dominant share of the closed
6 cannabis oil vaporizer systems and components market. These tactics include
7 knowingly fraudulent and abusive patent litigation and unreasonably anticompetitive
8 distribution agreements that are intended to, and do, unlawfully exclude NLV and
9 other competitors from the market. All of Smoore's anti-competitive tactics were
10 designed to, and did, achieve illegally what Smoore could not achieve on a fair
11 playing field: continued dominance and control of the closed cannabis oil vaporizer
12 market.

13 **PATENT LITIGATION BACKGROUND**

14 11. Since at least 2021, Smoore has pursued enforcement actions in China
15 and the United States to enforce patents that Smoore knew or should have known
16 were unenforceable. These enforcement actions were brought for the purpose of
17 unlawfully excluding competitors, including NLV.

18 12. In 2021, Smoore brought a patent infringement suit in Shenzhen
19 Intermediate People's Court of Guangdong Province, case number (2021)粤03民初
20 5424号 ((2021)Yue(03)MinChuNo.5424), alleging that Shenzhen Naixing
21 Technology Ltd. Co.("Naixing"), NLV's supplier of vape products, manufactured
22 and sold products that infringed Smoore's Chinese design patent: 201730049185.X,
23 entitled "Electronic Cigarette Atomizer (TH210)". The Shenzhen Intermediate
24 People's Court of Guangdong Province held that Naixing did not adequately establish
25 its defenses.

26 13. Naixing appealed the decision to the Guangdong High People's Court,
27

28 2022 Report at 17 ("In the U.S. market, the principle business of the Group included
the electronic nicotine delivery products and the sales of vaping products for special
purpose.").

1 case number (2022)粤民终4401号 ((2022)YueMinZhongNo.4401). In the appeal,
2 newly discovered evidence was submitted that showed Smoore's U.S. distributor,
3 Jupiter Research LLC ("Jupiter Research"), displayed and offered for sale Liquid 6
4 products at the Marijuana Business Conference & Expo 2016 ("2016 Expo"). Jupiter
5 Research's display of the Liquid 6 product predated the filing of Smoore's design
6 patent application in China, and thus could invalidate Smoore's patent. Jupiter
7 Research's display was therefore directly relevant to Naixing's non-infringement
8 defense in China of practicing existing designs.

9 14. Smoore challenged the authenticity of the new evidence submitted by
10 Naixing and argued that, as it was sourced from outside China, the evidence needed
11 to be notarized within China. After notarized evidence was provided and cross-
12 examination conducted at a hearing, the Guangdong High People's Court required
13 Smoore to respond to specific questions regarding the Liquid 6 product designs. In
14 response to the Court's questions, Smoore claimed "Liquid 6" is a trademark, did not
15 correspond to any specific product design, and that Smoore was unable to confirm
16 what products Jupiter Research displayed at the 2016 Expo. This latter assertion to
17 the Chinese Court was false: as set forth below, Naixing was able to obtain the
18 requested information through discovery.

19 15. Unsurprisingly, Smoore did not explain what efforts it made to obtain
20 the Chinese court-requested information from Jupiter Research. For example,
21 Smoore did not address: (1) whether Smoore requested information from Jupiter
22 employee Bob Crompton (who participated at the 2016 Expo); (2) what requests for
23 documents or other information were made, if any, of Jupiter Research; or (3) who
24 at Jupiter Research was contacted regarding these issues prior to responding to the
25 Guangdong High People's Court's requests. Nor did Smoore address the fact that the
26 description of Liquid 6 on Jupiter Research's website indicates that Jupiter's and
27 Smoore's versions of the Liquid 6 cartridge are essentially the same.

28 16. Because Smoore failed to fully and accurately respond to the Chinese

1 Court's inquiry regarding the Liquid 6 products, Naixing was forced to seek
2 discovery in the U.S. directly from Jupiter Research and Mr. Crompton via 28 U.S.C.
3 § 1782. Document and deposition discovery confirmed that, contrary to Smoore's
4 statements to the Chinese Court, Smoore provided the Liquid 6 products displayed
5 by Jupiter Research at the 2016 Expo.

6 17. Smoore's provision of the Liquid 6 products to Jupiter Research
7 rendered Smoore's Chinese design patent: 201730049185.X, entitled "Electronic
8 Cigarette Atomizer (TH210)," invalid, foreclosing Smoore's effort to enforce that
9 design patent in China, and supporting Naixing's non-infringement defense in China
10 of practicing the prior art. Smoore knew or should have known prior to filing its
11 enforcement action in China that the action was unfounded.

12 18. Also in 2021, Smoore filed a Complaint with the International Trade
13 Commission (ITC) alleging infringement of three U.S. Patents, including the '762
14 and '763 Patents, as well as U.S. Patent No. 10,357,623 ("the '623 Patent").
15 Smoore's Complaint listed 38 Proposed Respondents, which included much of the
16 closed cannabis vaporizer market. The ITC instituted an investigation, *Certain Oil-*
17 *Vaping Cartridges, Components Thereof, and Products Containing the Same*, Inv.
18 No. 337-TA-1286 (the "ITC Investigation"), by publication of a notice in the Federal
19 Register (86 Fed. Reg. 62567-69) on November 10, 2021.

20 19. In the ITC Investigation, Smoore accused NLV's AVD C1, C2, C3, and
21 C4 cartridges, and GoodCarts Glass Oil (C2) cartridge—the same cartridges accused
22 here— of infringing the patents asserted in Inv. No. 337-TA-1286.

23 20. A key patent at issue in the ITC investigation was the '623 Patent, which
24 Smoore asserted to the ITC that all Respondents' accused vaporizer products
25 infringed.

26 21. During discovery in the ITC Investigation, Respondents learned that
27 Smoore's '623 Patent was improperly obtained by the submission of a materially
28 false declaration to the U.S. Patent Office. The '623 Patent was thus unenforceable.

1 Smoore should have known of this false declaration before filing its ITC Complaint,
2 and it is beyond dispute that the false declaration became known to Smoore during
3 discovery in the ITC Investigation. Respondents subsequently sought to have Smoore
4 dismiss its '623 Patent from the case, but Smoore continued to assert this patent
5 against Respondents' accused products.

6 22. In February 2022, the ITC's Chief Administrative Law Judge ("CALJ")
7 issued an Initial Determination finding:

- 8 • Smoore failed to show that its own products practice any claim of its asserted
9 patents and, therefore, Smoore failed to meet the ITC Domestic Industry
10 technical prong requirement necessary for finding a violation of Section 337;
- 11 • Smoore improperly relied on its licensees Greenlane Holdings, LLC and
12 Jupiter Research, as well as Jupiter-related companies Standard Farms and
13 Commonwealth Alternative Care, to claim Smoore met the 337 Domestic
14 Industry economic prong requirement. Smoore also overstated the claimed
15 investments of its U.S. Subsidiary, Spectrum Dynamic Research, to support its
16 Domestic Industry Claim;
- 17 • Smoore failed to show that NLV's products infringe any claim of the asserted
18 patents;
- 19 • NLV's accused products did not infringe the '623 Patent because they are
20 missing at least an absorbent element "being attached to an outside surface of
21 the liquid outlet" or attached to the "outside surface of the outlet-defining
22 element"; the accused outlet-defining element does not reduce the size of the
23 liquid outlet;"
- 24 • The '623 Patent was unenforceable because a materially false declaration was
25 knowingly submitted to the U.S. Patent Office in support of an effort to obtain
26 the '623 Patent;
- 27 • NLV's products do not infringe the '762 Patent because they are missing at
28 least a "heating element embedded in an interior of the liquid absorption
element, wherein an edge of the heating element is internally tangent to the
atomizing surface"; and "a power source assembly connected to the atomizing
assembly;"
- NLV's products do not infringe the '763 Patent as they are missing at least "a
mouthpiece assembly."

25 A public copy of the Initial Determination is attached hereto as Exhibit 2. *See*
26 Exhibit 2 at 55-75, 94-102.

27 23. Notwithstanding the ITC's determination, on October 19, 2022, Smoore
28 filed this instant District Court Action, alleging that NLV has infringed, and is

1 infringing, one or more claims of U.S. Patent Nos. 10,791,762 (“’762 Patent”);
2 10,791,763 (“’763 Patent”); D817,544 (“D544 Patent”); D823,534 (“D534 Patent”);
3 and D853,635 (“D635 Patent”) (collectively, the “Patents-in-Suit.”). The Action
4 was stayed pursuant to 28 U.S.C. § 1659(a) pending a final determination in the ITC
5 Investigation, and the stay lifted in March 2024.

6 24. Smoore understandably did not seek to enforce the fraudulently-
7 obtained ’623 Patent here. The damage, however, was done: Smoore’s efforts to
8 enforce the fraudulently-obtained ’623 Patent substantially damaged both NLV and
9 competition in the closed cannabis oil vaporizer systems and components market as
10 a whole.

11 **UNITED STATES MARKET BACKGROUND**

12 25. In 2012, the floodgates opened. After decades of full criminalization
13 followed by years of limited steps to legalize cannabis for medical use, two states
14 (Colorado and Washington) legalized the recreational use of cannabis at the state
15 level. Alaska, Oregon, and Washington, D.C. would follow in 2014, and California,
16 Nevada, Massachusetts, and Maine in 2016.

17 26. In just a few short years, cannabis had been effectively legalized in state
18 markets across the country. This rapid change in policy left many previously barred
19 entrants rushing to get a piece of this newly legal market for cannabis and cannabis-
20 related products.

21 27. The rush to enter this new market was not limited to cannabis producers.
22 The wave of cannabis legalization also led to booming interest in new forms of
23 cannabis consumption, including through the use of vaporizer technology. When
24 cannabis was widely illegal in the United States, development of cannabis
25 consumption methods was limited by the lack of professionalized cannabis producers
26 investing research and development efforts into improving existing cannabis
27 consumption methods. After legalization, cannabis producers looked for innovative
28 ways to improve the cannabis experience for consumers, including through wider use

1 of cannabis oils for use in vaporizers.

2 28. Vaporizer manufacturers like Smoore rushed to join this newly booming
3 market. However, existing vaporizer technology at the time was created for use with
4 nicotine rather than cannabis oils. Liquids containing nicotine are not viscous and are
5 homogenous, whereas cannabis oils are less stable, more viscous, and less
6 homogenous. It is thus difficult to leverage nicotine vaporizer technology into the
7 closed cannabis vaporizer market without substantial improvements. For example,
8 many early vaporizer manufacturers used cotton wicks, which had an unpleasant
9 taste, burned oil, and had the potential for leaks and clogs.

10 29. Plaintiff/Counter-Defendant Smoore was an early entrant into the
11 market for closed cannabis vaporizer and component technology, selling vaporizers
12 with a ceramic heating component into the US market through distributors at least as
13 early as 2016.

14 30. Smoore in its financial reports claims that it has invested in research
15 and development for closed cannabis vaporizer systems and components specifically
16 for designed for cannabis consumption and delivery -- what Smoore calls “vaping
17 products for special purpose.”⁵ “Special purpose” is Smoore’s euphemism for
18 cannabis.

19 31. As a result of Smoore’s early entrance into the closed cannabis vaporizer
20 systems market, Smoore grew quickly to amass a dominant market share of more
21 than 80%.

22 32. However, Smoore’s dominant market position masked serious
23 weakness with Smoore’s products. As the market matured, Smoore’s customers
24 demanded higher-quality closed cannabis vaporizer products tailored specifically for
25 cannabis oil, rather than products designed for nicotine liquids.

26 ⁵ See Smoore Holding’s 2022 Annual Report (“During the Review Period, we
27 made satisfactory progress in research and development (“R&D”) investment,
28 particularly in new heating element technology, *special-purpose vaping devices* and
aerosol drug delivery devices, etc., laying a solid foundation for the long-term
competitiveness of the Group.” (emphasis added).

1 33. Competing closed cannabis vaporizer system technology companies
2 began to take advantage of Smoore's failure to keep up with this market demand for
3 higher-quality closed cannabis vaporizer system products. Competitors, including
4 NLV, invested heavily in research and development to create vaporizer products
5 tailored to the unique characteristics of cannabis oil. These efforts included
6 experimenting with different materials, specifications, and technologies that could
7 improve user experience and reliability.

8 34. Beginning around 2018 or 2019, Smoore began losing market share to
9 these upstart American competitors, who could experiment directly with cannabis oil
10 in ways that Smoore, as a Chinese company with Chinese research and development
11 operations, could not at the time.

12 35. Even as the market for cannabis vaporizers was growing, with sales as
13 much as doubling between 2020 and 2022, Smoore's market share began to erode.
14 Between 2018 and 2023, Smoore's market share for its CCELL products dropped
15 from over 80% to approximately 50-60%. Smoore's abusive patent litigation and
16 attempted enforcement of the fraudulently-obtained '623 patent were undertaken in
17 an effort to stop further market share erosion. Smoore's anticompetitive patent
18 litigation and efforts to exclude NLV and others from the U.S. closed cannabis
19 vaporizer systems market effectively slowed the rate at which Smoore lost market
20 share, and enabled Smoore to maintain a dominant share of the market.

21 36. Faced with this rapid decline in fortunes and its inability to keep up with
22 research and development in the industry, Smoore undertook a plan to suppress and
23 eliminate competition in the market for closed cannabis vaporizer systems
24 technology.

25 37. Smoore's plan was two-fold: (1) abuse the legal systems of both China
26 and the United States by misusing intellectual property rights to exclude smaller
27 competitors from the market; and (2) use early market power in the U.S. to exclude
28 smaller competitors by enforcing abusive and exclusionary distribution agreements

1 in the United States. These tactics enabled Smoore to vastly slow the pace of its
2 precipitous market share loss and maintain monopoly power in the closed cannabis
3 vaporizer systems market.

4 **Smoore's Unlawful And Exclusionary Patent Litigation**

5 38. Smoore markets itself as the “world’s leading atomization technology
6 company”⁶ and “the world’s largest vaping technology manufacturer.”⁷ Smoore has
7 been the world’s largest atomization device manufacturer since 2019.⁸ Smoore,
8 through its CCELL brand, now advertises its products specifically for use with
9 cannabis oils.⁹

10 39. Smoore’s social media advertises its CCELL brand’s involvement in the
11 cannabis industry, including various recent postings related to CCELL marketing
12 efforts at San Francisco Hash Week,¹⁰ a cannabis industry event. Smoore’s
13 marketing efforts also include re-posting an Instagram post by a user named
14 “smokemycannabis” containing images of a CCELL-branded closed cannabis
15 vaporizer system which tagged the CCELL Instagram account and used the hashtag
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22 ⁶ See <https://en.smooreholdings.com/>, last accessed May 20, 2024.

23 ⁷ See <https://en.smooreholdings.com/about/>, last accessed May 20, 2024.

24 ⁸ See <https://en.smooreholdings.com/about/>, last accessed May 20, 2024.

25 ⁹ See CCELL Vape Cartridges: Choose the Best for Your Brand, July 19, 2024,
26 <https://www.ccell.com/blogs/ccell-vape-cartridges-choose-the-best-for-your-brand>
27 (last accessed October 2, 2024) (“Choosing the right cartridge enhances flavor and
28 vapor quality, and ensures compatibility with various cannabis oils like live rosin,
liquid diamonds, and traditional distillates. In this blog, we'll explore CCELL's vape
cartridges, advanced heating elements, and why they are the best choice for your
brand.”).

29 ¹⁰ See [https://www.instagram.com/reel/C_frN4HNxFQ/?utm_source=ig_web_copy_link&
igsh=MzRIODBiNWFiZA==](https://www.instagram.com/reel/C_frN4HNxFQ/?utm_source=ig_web_copy_link&igsh=MzRIODBiNWFiZA==), last accessed October 3, 2024.

1 “#Cannabis.”¹¹ Screenshots of this Instagram post are below.



See https://www.instagram.com/p/C-4DjHtJ6cA/?utm_source=ig_web_copy_link&igsh=MzRIODBiNWFiZA==, last accessed October 3, 2024.

1 40. Smoore also advertises its vaporizer products extensively on the “High
2 Times” website and in the “High Times” magazine, both of which (as the name
3 suggests) target cannabis users. Smoore even sponsored the “High Times” 100 Gala
4 on May 24, 2022, which is “an annual event honoring 100 of the most influential
5 people in the cannabis industry.”¹²

6 41. As the ITC recently found, a key patent asserted by Smoore related to
7 its “atomization technology” was fraudulently obtained by a Smoore employee in the
8 Intellectual Property department. Smoore nevertheless aggressively pursued
9 litigation to try and enforce its fraudulently obtained patent. Smoore’s aggressive
10 litigation efforts drove several would-be competitors out of the closed cannabis
11 vaporizer market.

12 42. Smoore has similarly abused Chinese patent law, and still insists that its
13 design patent is valid, despite evidence showing that its claimed design was publicly
14 used and disclosed in 2016, which was before Smoore even filed its Chinese design
15 patent application that led to the design patent at issue.

16 43. As discussed above, Smoore filed a Complaint at the ITC listing
17 numerous Respondents, including NLV. Smoore’s complaint alleged that the
18 defendants, including NLV, imported products into the United States that infringed
19 upon three of Smoore’s patents for oil-vaping cartridges, two of which are at issue in
20 this case.

21 44. As the ITC found, in late 2014 and early 2015, Smoore, through an
22 employee of its intellectual property department named Wenjian Qi, learned of an
23 abandoned patent application submitted by inventor Xiaolin Fang. Qi and Fang
24 reached an agreement whereby a company headed by Mr. Qi’s wife would purchase
25 the abandoned application. Qi then worked with a patent prosecutor to revive the
26 patent application by fraudulently asserting that the delay in filing the reply to the
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28 ¹² See <https://www.ccell.com/news/ccell-sponsor-hightimes100-gala>, last
accessed October 3, 2024.

1 notice of abandonment was unintentional. After the patent ('623) was issued from
2 continuations of this application, Smoore purchased the patent from the company
3 headed by Mr. Qi's wife. Ex. 2 at 91-92.

4 45. On October 4, 2021, Smoore filed its complaint with the ITC alleging
5 infringement of the fraudulently obtained '623 patent. The complaint listed 38
6 Respondents, all of which were entities substantially smaller than Smoore.

7 46. During the course of the investigation, at least 12 Respondents were
8 terminated based on consent orders. Another two Respondents were terminated based
9 on withdrawal of allegations in the complaint. Six more Respondents were found in
10 default. On information and belief, a number of these parties entered into agreements
11 with Smoore to resolve the allegations in the complaint by exiting the market. At
12 least three of the original Respondents, and likely more, appear to have since gone
13 out of business entirely.

14 47. As discussed above, in February 2022, the ITC's CALJ Clark S. Cheney
15 issued an Initial Determination that the Respondents' accused products did not
16 infringe Smoore's asserted patents and had not violated international trade law, at
17 least in part due to Smoore's actions of: (1) fraudulently obtaining the '623 patent
18 and (2) wrongfully using the ITC by misrepresenting Smoore's participation in U.S.
19 commerce in an effort to satisfy the economic prong of the ITC's domestic industry
20 requirement.

21 48. Specifically, the CALJ found that: "There is only one conclusion that a
22 reasonable factfinder can draw from this record evidence: [patent prosecutor] Mr.
23 Cheng knowingly submitted a false declaration about the reason the '553 application
24 [leading to the '623 Patent] was abandoned. I so find."¹³ Thus, the CALJ found that
25 Smoore's '623 Patent was obtained by knowingly submitting a false declaration.

26 49. Further, Smoore improperly relied on its licensees, who were mere
27 importers, and those licensees' related companies -- as opposed to Smoore's

28 ¹³ Ex. 2, ITC Initial Determination (Public Version) page 93.

1 activities -- and overstated Smoore's investments in its U.S. Subsidiary to claim that
2 Smoore met the economic prong of the ITC's Domestic Industry requirement.¹⁴

3 50. For all three patents asserted in the ITC investigation, NLV was found
4 not to be in violation of Section 337 of the Tariff Act by importing and selling oil-
5 vaping cartridges.

6 51. Smoore knew or should have known that its '623 Patent was obtained
7 fraudulently. Smoore also should have known before filing its Complaint at the ITC
8 that relying on Smoore's distributors and Smoore's insignificant investment in its
9 U.S. subsidiary were inadequate to meet the ITC's Domestic Industry economic
10 prong requirement. Despite this, Smoore continued to pursue litigation to drive out
11 competitors, and demanded settlements that were intended to, and did, exclude
12 competitors from the market. Smoore's abusive litigation both unreasonably
13 restrained competition in the closed cannabis vaporizer systems market by driving
14 out competitors and damaged NLV by forcing NLV to expend substantial resources
15 defending a case that Smoore knew or should have known was baseless from the
16 start.

17 52. Undaunted by its ITC loss, Smoore is now attempting to re-litigate two
18 of the patents at issue in the ITC Investigation (the '762 Patent and the '763 Patent),
19 along with three design patents.

20 53. In addition to the ITC Investigation, as discussed above, Smoore has
21 also been engaged in a design patent dispute in China against NLV's supplier,
22 Naixing. In that case, Smoore evaded acknowledging, by providing misleading
23 responses to the Chinese Court's questions, that it had supplied its distributor Jupiter
24 Research certain products for display and offer for sale at a conference in Las Vegas
25 in 2016. Smoore's early disclosure of these products (the "Liquid 6") to Jupiter
26 Research, before the filing of Smoore's design patent application claiming the same
27 design, would invalidate Smoore's Chinese design patent and provide a non-

28 ¹⁴ *Id.* at page 95-101.

1 infringement defense for Naixing.

2 54. However, Naixing has since uncovered evidence that Smoore's
3 misleading responses to the Chinese Court's questions were false, as shown by video
4 from the conference in question. As one of the patents asserted in this case is based
5 on the Chinese patent at issue in that case, Smoore's false written representation in
6 the Chinese patent litigation continues their pattern and practice of abusing tribunals
7 for anticompetitive purposes.

8 55. Despite the significant evidence that at least two of its patents (the '623
9 Patent and Chinese design patent) were invalid due to fraud and false statements,
10 Smoore has continued its course of conduct of using these patents, including the five
11 patents at issue in the Complaint, with the goal of wrongfully excluding competitors
12 from the market.

13 56. Smoore's pattern and practice throughout these various patent litigation
14 actions has been to assert patents that Smoore knew or should have known were
15 invalid or unenforceable in order to force smaller competitors out of the market by
16 entering into exclusionary settlement agreements.

17 57. As a result of Smoore's conduct in pursuing this litigation, NLV has
18 been forced to spend more than \$3 million to defend against the various actions
19 instituted by Smoore.

20 58. Smoore has additionally used the threat of this abusive patent litigation
21 to poach NLV's customers. Smoore and its distributors contacted NLV's customers
22 questioning NLV's viability as a business due to Smoore's patent litigation, including
23 one major customer who demanded written assurances from NLV. While NLV did
24 its best to reassure this customer that Smoore's allegations were meritless, the
25 customer decided to diversify its supply sources as a direct result of Smoore's threats.
26 This customer now buys some portion of its closed cannabis oil vaporizer system and
27 component products from Smoore in addition to the products it buys from NLV.
28 Smoore's attempt at using its abusive patent litigation as an economic coercion

1 mechanism aimed at NLV's customers was successful, and NLV lost business as a
2 result.

3 **Smoore's Distributor Agreements**

4 59. Smoore, through its CCELL brand, distributes its closed cannabis
5 vaporizer system products (the systems and components) by selling directly to both
6 cannabis oil producers and, primarily, through distributors.

7 60. Smoore attempts to use its distribution agreements to limit competition
8 for closed cannabis vaporizer systems and components.

9 61. Smoore and its distributors met in person to establish and reconfirm
10 their commitment to the anticompetitive provisions in Smoore's distribution
11 agreements. For example, on information and belief, in 2019, Smoore and its
12 distributors met in person in Los Angeles. At this meeting, Smoore and its
13 distributors confirmed that the terms of their distribution agreements prevented the
14 distributors from competing with one another or Smoore. There were other similar
15 meetings between Smoore and its distributors.

16 62. On information and belief, Smoore and its distributors have agreed to
17 include the following terms in Smoore's distribution agreements:

- 18 • Exclusivity: CCELL distributors are forbidden from selling competing
19 vaporizer products. In a nascent market, this forecloses market entry for
smaller potential entrants.
- 20 • Mandatory Price Guidelines: CCELL distributors must sell at CCELL-
21 approved pricing.
- 22 • Banned Competition: Distributors are banned from selling to existing
customers of CCELL or other distributors.
- 23 • Security Deposits: CCELL requires a security deposit and will deduct money
24 for violations of the mandatory price guidelines.
- 25 • Required Monthly Monitoring Reports: Distributors must provide customer
lists and prices to Smoore every month.
- 26 • Required Monitoring for Copied Products: Distributors must combat copied
27 products.

28 63. Rather than a simple restriction to improve and/or simplify Smoore's

1 distribution process, these restrictions serve to reduce both intra-brand and inter-
2 brand competition for closed cannabis vaporizer systems and components. Moreover,
3 because Smoore also sells its products directly to customers, Smoore's distribution
4 agreements effectively are horizontal agreements that, by definition, unreasonably
5 limit competition.

6 64. Smoore's distribution agreements explicitly and implicitly restrict
7 distributors from competing with either Smoore or other entities selling Smoore
8 vaporizers and forbid competition between Smoore-authorized distributors and
9 Smoore itself.

10 65. Smoore-authorized distributors are also forbidden from selling
11 competing vaporizer products, including NLV products. Smoore's distribution
12 agreements thus are intended to, and do, unreasonably exclude NLV from the market
13 and restrain NLV's participation in the closed cannabis oil vaporizer systems market.

14 66. Smoore also instituted mandatory wholesale price guidelines to restrict
15 competition. Smoore instituted a security deposit system pursuant to which Smoore
16 would deduct money for violations of these mandatory price requirements. These
17 mandatory prices, along with the non-solicitation agreements, ensured that cannabis
18 oil producers and other purchasers paid higher prices for closed cannabis vaporizer
19 systems than they otherwise would have absent these agreements.

20 67. These agreements also effectively required the distributors to sell at
21 prices at or above the prices at which Smoore – a competitor as well as manufacturer
22 – sold its cannabis vaporization technology into the closed cannabis vaporizer
23 systems market.

24 68. Smoore and its distributors policed their restrictive agreements.
25 Specifically, Smoore required distributors to exchange market condition information
26 – including price information -- with each other and with Smoore on a monthly basis.
27 These reports were mandatory. These mandatory information exchanges allowed
28 Smoore and its distributors to collectively police their unlawful agreement.

1 69. In addition to price, Smoore also required that distributors report their
2 customer lists on a monthly basis. This was to ensure that Smoore and its distributors
3 could police their restrictive agreements to prevent competition and increase prices
4 to closed cannabis oil vaporizer systems customers.

5 70. Smoore also created a formula for assessing its distributors. One
6 important factor in this assessment was cooperation with Smoore's restrictions on
7 competition.

8 71. Smoore also required its distributors to help combat copied products,
9 including providing copies of such products to Smoore. On information and belief,
10 this provision was included not to protect Smoore's intellectual property rights, but
11 rather as a pretext to further reduce competition in the market for closed cannabis
12 vaporizer system products.

13 72. Smoore actively engaged in policing competition in the market for
14 closed cannabis vaporizer system products. If Smoore thought a distributor was
15 engaging in competition, for example by selling products to an existing Smoore
16 customer, Smoore would send a communication to the distributor to stop the
17 competitive conduct and no longer sell to Smoore's pre-existing customer.

18 73. Smoore and its distributors produced instructional training materials for
19 use in training the distributors' employees. These materials included express
20 instructions that sales personnel at the distributors were prohibited from competing
21 for customers of other CCELL distributors.

22 74. Smoore's distributors understood this to be an anticompetitive
23 agreement between the distributors horizontally. If one distributor thought another
24 distributor was attempting to compete, the distributor would contact Smoore and ask
25 Smoore to enforce the agreement between competitors by warning the other
26 distributor against competing. Smoore has acted at the behest of its distributors to
27 stop nascent competition by prohibiting other distributors from selling to pre-existing
28 customers.

1 75. As a result of Smoore's collusive and coercive distribution agreements,
2 including the minimum resale price maintenance provisions, NLV has been
3 foreclosed from accessing distribution opportunities in California and elsewhere.

4 76. Specifically, NLV's products were previously distributed by Greenlane
5 Holdings, which merged with KushCo Holdings. When the merger was completed in
6 2021, Greenlane dropped NLV's products and became an exclusive distributor of
7 Smoore's products. NLV was therefore foreclosed from an important distribution
8 opportunity with one of the largest closed cannabis vaporizer systems distributors in
9 the United States.

10 77. Prior to the Greenlane/KushCo merger, sales from NLV to Greenlane
11 were already in the millions of dollars and expanding rapidly. As a result of Smoore's
12 efforts to foreclose access to the market, NLV directly lost millions of dollars in
13 annual sales to this distribution channel. As Greenlane has relationships with
14 different cannabis oil producers than NLV, NLV was also foreclosed from accessing
15 those Greenlane customer relationships.

16 78. The total U.S. market for closed cannabis vaporizer systems was
17 estimated to be around \$700 million in 2023, which is more than double the estimated
18 market size in 2019. The four major CCELL distributors (Jupiter Research,
19 Greenlane Holdings, 3WIN Corp., and CannaBrand), which account for most of
20 Smoore's sales in the U.S., held market shares matching Smoore's approximately
21 80% market share in 2019. Smoore's anticompetitive agreements with these
22 distributors effectively slowed Smoore's market share decline and allowed Smoore
23 to exclude NLV and other market entrants from the vast majority of the market
24 between 2019 and 2023.

25 79. As a result of this market foreclosure, NLV was forced to maintain
26 additional costly sales and distribution infrastructure, including a network of
27 salespeople and physical infrastructure such as warehouses to hold inventory which
28 would otherwise be held by distributors. As another example, NLV now spends

1 millions per year in trade marketing, including tradeshow attendance. If NLV were
2 able to access distribution networks, distributors would also provide trade marketing
3 and show NLV's products at these trade shows, saving NLV significant marketing
4 expenses. NLV also now has significant inventory carrying costs as inventory which
5 would otherwise be held by distributors is now held by NLV.

6 80. As a result of Smoore's exclusionary conduct, NLV's opportunity to
7 expand its sales rapidly to achieve economies of scale was significantly limited. Had
8 NLV achieved economies of scale by accessing the foreclosed distribution channels,
9 NLV would have been able to expand its sales more rapidly and lowered its product
10 cost per unit. Instead, NLV was forced to make significant investments in sales and
11 distribution infrastructure and personnel which prevented NLV from scaling up as
12 quickly as it would have, had NLV been afforded access to this distribution network.

13 81. As the market for cannabis vaporizer systems and components is an
14 emerging market, personal relationships are an important factor in obtaining sales
15 volume. NLV was foreclosed from access to distributors' personal relationships with
16 cannabis oil producers, which further hindered NLV's growth.

17 82. Smoore's exclusionary conduct meant that all major distributors were
18 "locked up" and NLV was prevented from accessing distribution networks for its
19 products. Smoore's anticompetitive conduct prevented other manufacturers of
20 Closed Cannabis Vaporizer Systems and Components from reaching economies of
21 scale, thus driving up costs for these products nationwide.

22 **Interstate Commerce**

23 83. Plaintiff/Counter-Defendant Smoore sells cannabis vaporizers in the
24 closed cannabis vaporizer systems market in the United States in a continuous and
25 uninterrupted flow of interstate commerce, including in this District.

26 84. Smoore's business substantially affects interstate commerce in the
27 United States and affects a substantial volume of trade and commerce in various
28 states in the United States.

1 85. Smoore sells closed cannabis vaporizer systems in the United States.
2 Smoore’s business substantially affects interstate commerce and has caused antitrust
3 injury to NLV and consumers in the United States.

4 86. CCELL, which Smoore claims is “a technology brand and global
5 innovator in the portable vaporizer space that revolutionized the industry by
6 introducing the ceramic heating component,”¹⁵ was established by Smoore in 2016
7 and has since become one of the world’s largest vaporizer suppliers.¹⁶ Smoore,
8 through its CCELL brand, sells wholesale closed cannabis vaporizer systems and
9 components to producers of cannabis oil in the United States, including in this
10 District. The cannabis oil producers then sell these closed cannabis vaporizer systems
11 devices to retail outlets and consumers through various retail methods.

12 87. Defendant/Counterclaimant NLV also sells closed cannabis vaporizer
13 systems and components to producers of cannabis oil, and thus competes in the same
14 market for wholesale closed cannabis vaporizer systems hardware for cannabis oil.
15 Neither Smoore, through CCELL, nor NLV produce cannabis oil or other products
16 containing cannabis.

17 **The Closed Cannabis Vaporizer Systems Market**

18 88. Closed Cannabis Vaporizer Systems and Components are a highly
19 specialized product utilized by a core group of sophisticated cannabis oil producers
20 and consumers whose preferences are strong enough to constitute an independent
21 antitrust market.

22 89. Cannabis (marijuana) refers to “the dried leaves, flowers, stems, and
23 seeds from the Cannabis sativa L plant. The plant contains the [...] chemical THC
24 and other similar compounds. Extracts can also be made from the cannabis plant.”¹⁷

25 90. Cannabis can be sold as a solid, usually either as resin or as dried plant

26 ¹⁵ See <https://www.ccell.com/news/ccell-launches-environmentally-conscious-eco-star-aio-vaporizer>, last accessed May 20, 2024.

27 ¹⁶ See <https://www.ccell.com/about-ccell>, last accessed May 21, 2024.

28 ¹⁷ See <https://nida.nih.gov/publications/drugfacts/cannabis-marijuana>, last
accessed May 23, 2024.

1 material, can be mixed into food products and sold as ingestible products (often called
2 “edibles”), or can be extracted into oils and waxes.

3 91. Products designed for cannabis inhalation generally fall into two
4 categories: smoking products and vaporizer products. While smoking products rely
5 on combustion to produce smoke that is inhaled into the lungs, vaporizer products do
6 not involve either burning or smoking. Rather, vaporizer products vaporize or
7 aerosolize the cannabis.

8 92. Vaporizer systems are not generally interchangeable with other methods
9 of consuming cannabis, including smoking and edible consumption. Vaporizers are
10 generally regarded as less harmful than smoking products, as vaporizers do not entail
11 the inhalation of smoke, which can include carcinogens. Vaporizer products are more
12 discreet and easier to use than smoking products, and can be used in a variety of
13 circumstances in which smoking generally is prohibited or frowned upon.

14 93. Edibles are absorbed in the body differently than smoked or vaporized
15 cannabis, and therefore offer a different experience than is obtained by smoking and
16 vaporization. Smoking is seen as more harmful to health than vaporizer systems, is
17 less discreet, and requires more consumer familiarity with cannabis use than
18 vaporization.

19 94. Cannabis vaporizers include both open and closed cannabis systems. In
20 an open cannabis vaporizer system, the cannabis consumer separately purchases
21 cannabis without a reservoir, such as dried cannabis plant material, which is then
22 inserted into a vaporizer device by the consumer. In a closed cannabis vaporizer
23 system, the consumer purchases both the cannabis product and the reservoir, which
24 is pre-filled by a cannabis producer.

25 95. Closed cannabis vaporizer systems are often much smaller than open
26 cannabis vaporizer systems and can thus be consumed discreetly. While open
27 cannabis vaporizer systems may require further processing of cannabis products,
28 such as grinding cannabis plant material into smaller pieces, closed cannabis

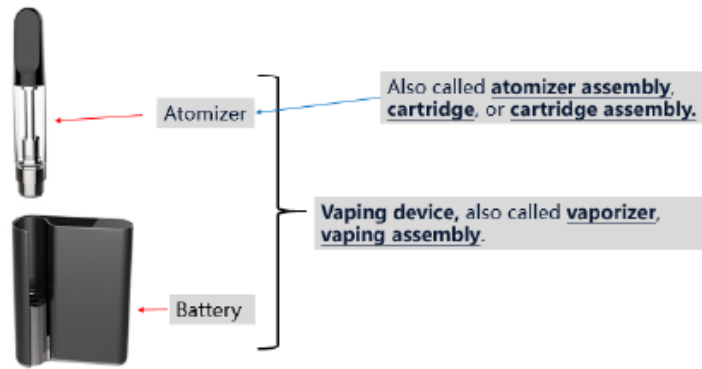
1 vaporizer systems require no further processing. Open cannabis vaporizer systems
2 are not reasonably interchangeable with closed cannabis vaporizer systems because
3 they lack the unique characteristics of closed cannabis vaporizer systems, including
4 ease of use and discreet consumption methods.

5 96. Closed cannabis vaporizer systems also offer other advantages because
6 they come in multiple forms, including cartridges, pods, and “all-in-one” systems.
7 The cannabis reservoir, or the entire product in the case of “all-in-one” systems, is
8 disposable and can be discreetly thrown away after use, leaving little to no physical
9 evidence that a cannabis product has been consumed. Unfilled closed cannabis
10 vaporizer system cartridges are also sold to cannabis oil producers rather than end
11 consumers, whereas open cannabis vaporizers are sold directly to end consumers.

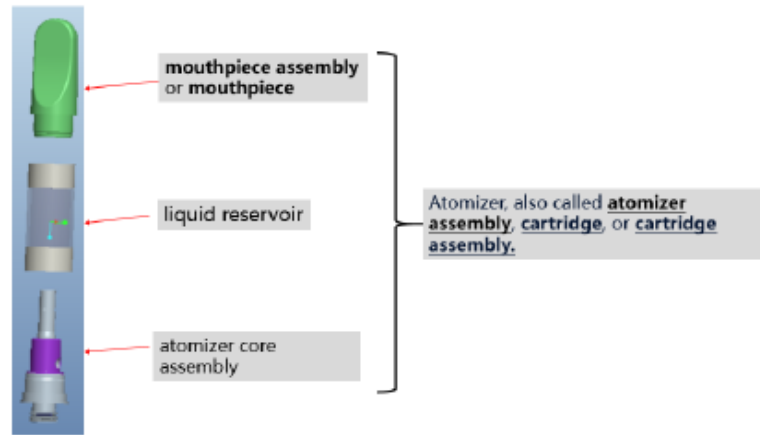
12 97. Closed cannabis vaporizer systems are thus a distinct market from open
13 cannabis vaporizer systems, both of which are eventually sold to cannabis consumers.
14 Unfilled closed cannabis vaporizer systems, however, are sold initially to a cannabis
15 oil producer which then adds the cannabis oil to the closed vaporizer system. Closed
16 cannabis vaporizer systems and cannabis oil are then sold to retail consumers
17 together.

18 98. Smoore’s Complaint contains a description and diagrams of closed
19 cannabis vaporizer systems. Complaint ¶¶ 20-21. As Smoore describes, closed
20 cannabis vaporizer systems consist of a battery and an atomizer/cartridge assembly,
21 with the atomizer/cartridge assembly including a mouthpiece and a reservoir which
22 is filled with cannabis oil by a cannabis oil producer. Below is a diagram of a closed
23 cannabis oil vaporizer system from Smoore’s Complaint. The top image shows a
24 Closed Cannabis Vaporizer System including an atomizer/cartridge assembly and
25 battery. The bottom image shows an atomizer/cartridge assembly, which consists of
26
27
28

a mouthpiece, liquid reservoir, and atomizer core assembly.



Drawing 1: illustration of atomizer (a/k/a atomizer assembly, cartridge, cartridge assembly) and vaping device (a/k/a vaporizer or vaping assembly)



Drawing 2: illustration of mouthpiece (a/k/a mouthpiece assembly), liquid reservoir, atomizer coil assembly and atomizer (a/k/a atomizer assembly, cartridge, or cartridge assembly)

99. The market for Closed Cannabis Vaporizer Systems and Components includes all-in-one systems, in which the entire system is sold together (atomizer/cartridge assembly and battery), and systems in which individual components, such as additional cartridges and batteries, may be sold separately.

100. The most common form of closed cannabis vaporizer system is a 510 threaded cartridge, which has accounted for 85-90% of closed cannabis vaporizer system sales in recent years, though the popularity of the 510 threaded cartridge

1 format has recently been decreasing. Other common forms of closed cannabis
2 vaporizer systems include other forms of filled cartridges, filled pods, and disposable
3 all-in-one devices.

4 101. The average wholesale sales price of an empty closed cannabis
5 vaporizer system cartridge (i.e., the sale of an empty cartridge to a cannabis oil
6 producer) is between \$0.80 and \$2.00.

7 102. While cannabis markets in the United States are limited to individual
8 states, the market for closed cannabis vaporizer systems and components is
9 nationwide.

10 103. Smoore, including CCELL, controls at least 50%-60% of the market for
11 closed cannabis vaporizer systems and components. Over the last five years
12 Smoore's market share has varied from a high of over approximately 80% to between
13 50-60%. Smoore's Complaint admits that it participates in the market for closed
14 cannabis vaporizer systems and components, as Smoore alleges that any
15 manufacturer selling such systems or components in a 'not-yet-assembled' form
16 (mouthpiece, reservoir, and atomizer assembly), would infringe upon Smoore's
17 design patents. Complaint ¶¶ 51, 59. Likewise, Smoore recognized in its annual
18 reports that it possessed a 'leading position' in the market for closed cannabis
19 vaporizer systems and components.¹⁸

20 104. Because of, inter alia, the differences between different cannabis
21 consumption methods, closed cannabis vaporizer systems are highly specialized
22 products utilized by a core group of sophisticated cannabis producers and consumers
23 whose preferences are strong enough to constitute an independent antitrust market.

24 105. As such, closed cannabis vaporizer systems do not exhibit strong,
25 positive cross-elasticity of demand with respect to the price of other cannabis
26

27 ¹⁸ See Smoore Holdings 2022 Annual Report at 17 ("For vaping products for
28 special purpose, we have improved the product matrix and will strengthen the sales
system by means of channel penetration, etc, and are confident in further
strengthening the leading market position in such field.").

1 consumption, or even other cannabis vaporizer, products. Thus, if a hypothetical
2 monopolist were to impose a small but significant nontransitory increase in the price
3 of closed cannabis oil vaporizer products, cannabis oil producers and consumers
4 could not switch to alternative products and thereby render the price unprofitable,
5 because no other product would result in a cannabis consumption product with the
6 required characteristics discussed above.

7 **Supply-Side Substitution is Unlikely Because of High Entry Barriers**

8 106. The development and manufacture of closed cannabis oil vaporizer
9 systems requires a lengthy research and development process, expensive and
10 particular facilities and equipment, and exhaustive testing in bench samples and at
11 scale. In particular, the production of closed cannabis oil vaporizer systems requires
12 suitable manufacturing plants with appropriate equipment and advanced laboratories
13 with specific equipment, including costly and unconventional machines and devices.

14 107. In case of price increases, other potential vaporizer system
15 manufacturers would be unable to respond by promptly altering their production
16 processes to enter into the market in order to render the price increase unprofitable,
17 especially because the development process is lengthy, costly and responds to
18 specific technical requirements of cannabis oil producers.

19 108. There are substantial barriers to market entry in the closed cannabis oil
20 vaporizer system market, including Smoore's scheme to attempt to enforce invalid
21 patents and Smoore's unreasonably anticompetitive distribution agreements and
22 horizontal price controls. Smoore's attempt to bar competitors from the market by
23 bringing its since-rejected claim before the ITC successfully drove several
24 competitors from the market and imposed significant additional costs on the
25 competitors that did manage to retain a position in the market. At least three
26 respondents in the ITC proceeding appear to have gone out of business entirely
27 during the ITC proceeding.

28 109. As a result of the above, supply-side substitution is unlikely, and as

1 such, the possibility of supply-side substitution does not meaningfully constrain
2 prices in the market for closed cannabis oil vaporizer systems.

3 **Relevant Geographic Market**

4 110. The relevant geographic market for closed cannabis oil vaporizer
5 systems is the United States. Cannabis is currently legal for recreational use in 24
6 states, and for medical use in an additional 14 states. While each state's cannabis
7 market is localized to within the borders of that state, the market for closed cannabis
8 oil vaporizer systems is nationwide, as closed cannabis oil vaporizer systems not
9 containing cannabis, such as products provided by Smoore and NLV, can be shipped
10 nationwide.

11 111. Cannabis oil producers and consumers can only access cannabis
12 vaporizer systems available in the United States and allowed to be purchased, sold
13 and utilized in the United States. Further, cannabis oil producers utilize the United
14 States to produce their cannabis oil to be sold in the various states of the United
15 States. The closed cannabis oil vaporizer system market thus operates on a
16 nationwide basis. Much of the sales activity in the market occurs through nationwide
17 channels.

18 112. To compete effectively within the United States, distributors and
19 manufacturers of closed cannabis oil vaporizer systems need distribution assets and
20 relationships within the United States. Manufacturers and distributors who lack such
21 assets and relationships are unable to constrain the prices of closed cannabis oil
22 vaporizer systems of manufacturers and sellers who have such domestic assets and
23 relationships. Therefore, the relevant geographic market is the United States. This is
24 dictated in large part by the fact that, as alleged above, Smoore's invalid patents work
25 as entry barriers, by preventing and excluding the importation of any goods into the
26 United States that could compete in the closed cannabis oil vaporizer system market.

27 **Monopoly Power**

28 113. Smoore had and has monopoly power in the closed cannabis oil

1 vaporizer systems and components market in the United States, defined above, which
2 allows Smoore to unilaterally control prices and exclude competitors, by means other
3 than competition on the merits. Further, through the anticompetitive conduct alleged
4 herein, Smoore leveraged its monopoly power in the closed cannabis oil vaporizer
5 system market to exclude and further monopolize the market for closed cannabis oil
6 vaporizer systems by utilizing sham litigation and coercive distribution agreements
7 and unreasonable horizontal and vertical pricing and sales agreements.

8 114. Because of Smoore's exclusionary scheme, including its attempted
9 enforcement of its invalid patents, Smoore has been able to forestall competition in
10 the closed cannabis oil vaporizer systems market, making it unlikely that any other
11 entrant could have gained a meaningful market share at the time of the violations
12 alleged herein.

13 115. Further, as detailed above, in the closed cannabis oil vaporizer systems
14 market, there are substantial barriers to market entry and to competitors' ability to
15 increase their output in the short run, including Smoore's exclusionary scheme.

16 116. In addition, the development of closed cannabis oil vaporizer systems is
17 a lengthy, costly, and uncertain process. As such, developing potential market
18 alternatives would require exhaustive testing, substantial technical know-how,
19 research and development capabilities, and significant capital investment.

20 117. Thus, potential market entrants face a substantial competitive
21 disadvantage with regard to the largest established supplier of closed cannabis oil
22 vaporizer systems, Smoore.

23 118. Finally, Smoore's actions described above are direct evidence of
24 Smoore's monopoly power. In particular, Smoore had the power to unilaterally
25 increase prices substantially and utilize that power to exclude competition in the
26 market for closed cannabis oil vaporizer systems through its dealings with
27 distributors.

28 119. Smoore's monopoly power and motivation to forestall competition is

1 also reflected in its financial results. In 2021, Smoore's reported revenues rose
2 approximately 37.4% over the previous year as gross profit margin increased slightly
3 from 52.9% to 53.6%.¹⁹ ²⁰ In 2022, Smoore's total revenue declined as its gross
4 profit margin dropped sharply, to 43.4%.²¹ In 2023, Smoore issued a warning to
5 investors that net profit for the first 6 months of the year would be starkly lower than
6 the previous year as revenues had declined again. ²²

7 **NLV'S U.S. PATENT NO. 11,744,294**

8 120. NLV owns by assignment U.S. Patent No. 11,744,294 (the "'294
9 Patent"), entitled "Cartridge Packaging Systems and Methods". The U.S. Patent and
10 Trademark Office ("USPTO") lawfully and duly issued the '294 Patent on September
11 5, 2023. A true and correct copy of the '294 Patent is attached hereto as Exhibit 1.

12 121. NLV asserts Smoore's accused products infringe at least independent
13 claims 1, 10, 18, and 19 of the '294 Patent literally and/or under the doctrine of
14 equivalents.

15 **SMOORE'S ACCUSED PRODUCTS**

16 122. Smoore offers and continues to offer for sale cartridge packaging and
17 capping systems for filling and capping oil-vaping cartridges. The cartridge
18 packaging includes a first tray made of deformable material (such as foam) with voids
19 for holding cartridge bodies; cartridge bodies; a cover that covers the first tray; a
20 second tray made of deformable material with voids for holding mouthpieces; and
21 mouthpieces. Each capping system further includes a jig.

22 123. Smoore's Accused Products include: packaging of "CCELL Snap-Fit"
23 cartridges and mouthpieces; packaging of "CCELL Press-Fit" cartridges and
24 mouthpieces; packaging of "CCELL All-In-One" devices and mouthpieces; "CCELL

25 ¹⁹ [https://tobaccoreporter.com/2022/04/08/smoore-revenue-jumps-nearly-40-](https://tobaccoreporter.com/2022/04/08/smoore-revenue-jumps-nearly-40-percent/)
26 [percent/](https://tobaccoreporter.com/2022/04/08/smoore-revenue-jumps-nearly-40-percent/) (last accessed June 5, 2024).

27 ²⁰ Smoore Holdings 2022 Annual Report. Smoore does not break down revenue
figures by product line.

28 ²¹ Smoore Holdings 2022 Annual Report.

²² <https://tobaccoreporter.com/2023/07/20/smoore-issues-profit-warning/> (last
accessed June 5, 2024).

1 Snap-Fit Capping Press”, “CCELL Press-Fit Capping Press”, and “CCELL All-In-
2 One Capping Press,” as demonstrated in the exemplary infringement claim chart
3 attached hereto as Exhibit 3. The Accused Products are sold and/or offered for sale
4 in this District by or on behalf of Smoore.

5 124. On information and belief, Smoore prepared videos of its packaging and
6 capping systems that copied certain visual and language presentation aspects of
7 NLV’s capping system video. Smoore also hired a NLV employee who then made
8 the CCELL marketing videos promoting Smoore’s packaging and capping systems.²³

9
10 **COUNT I**
(Declaratory Judgment of Noninfringement of the ’762 Patent)

11 125. NLV incorporates by reference the allegations contained in all
12 preceding paragraphs of these counterclaims.

13 126. Smoore contends that it owns the ’762 Patent, and that NLV infringes
14 at least claims 1, 2, and 7 of the ’762 Patent by making, testing, using, offering for
15 sale, selling and/or importing into the United States NLV’s Accused Products.

16 127. An actual and justiciable controversy between Smoore and NLV exists
17 regarding whether NLV has infringed any claims of the ’762 Patent by making,
18 testing, using, offering for sale, selling and/or importing into the United States NLV’s
19 Accused Products, and this controversy is ripe for adjudication by this Court.

20 128. NLV’s products, including its Accused Products, do not infringe any
21 claims of the ’762 Patent, either literally or under the doctrine of equivalents, at least
22 because there is no “heating element embedded in an interior of the liquid absorption
23 element”, no “heating element...wherein an edge of the heating element is internally
24 tangent to the atomizing surface”, and no “power source assembly...configured to
25 provide power for the heating element”, as required by independent claim 1. This is
26

27 ²³ See CCELL Press-Fit <https://www.youtube.com/watch?v=zjxoTjOz84k>; CCELL Snap Fit
28 https://www.youtube.com/watch?v=Fd8vFz_XJ6s; CCELL All in One
https://www.youtube.com/watch?v=Dm7FqO-_nkU.

1 supported by the CALJ's findings in the ITC Investigation. *See* Exhibit 2 at 65, 68,
2 70-72.

3 129. While Smoore argued that the Accused Products each included wires
4 and a threaded connection for connecting to a battery, the CALJ noted that "wires
5 and a threaded connection do not by themselves satisfy the power source assembly
6 limitation", and found that "Smoore has failed to show a battery or any other power
7 source assembly in any [] Accused Product." *Id.* at 71. Smoore admits as much in its
8 own Complaint filed with this Court, that NLV's Accused Products do not include a
9 battery, by pleading that the NLV's oil-vaping cartridges must "then further [be]
10 assembled with a battery or other power source to form vaping devices." *See* Dkt. 1
11 at ¶ 20. As mentioned above, the same NLV products were accused in both the ITC
12 Investigation and this instant District Court Action.

13 130. The remaining asserted claims—2 and 7—each depend from claim 1.
14 As the CALJ found that the Accused Products, including NLV's Accused Products,
15 do not infringe claim 1, the Accused Products do not infringe claims 2 and 7. *Id.* at
16 72.

17 131. To this end, and pursuant to the Federal Declaratory Judgment Act, 28
18 U.S.C. §§ 2201 *et seq.*, NLV requests a judicial determination that making, testing,
19 using, offering for sale, selling, and/or importing into the United States NLV's
20 Accused Products do not infringe any valid and enforceable claim of the '762 Patent.

21 **COUNT II**
22 **(Declaratory Judgment of Noninfringement of the '763 Patent)**

23 132. NLV incorporates by reference the allegations contained in all
24 preceding paragraphs of these counterclaims.

25 133. Smoore contends that it owns the '763 Patent, and that NLV infringes
26 at least claims 1 and 11 of the '763 Patent by making, testing, using, offering for sale,
27 selling and/or importing into the United States NLV's Accused Products.
28

134. An actual and justiciable controversy between Smoore and NLV exists regarding whether NLV has infringed any claims of the '763 Patent by making, testing, using, offering for sale, selling and/or importing into the United States NLV's Accused Products, and this controversy is ripe for adjudication by this Court.

135. NLV's products, including its Accused Products, do not infringe any claims of the '763 Patent, either literally or under the doctrine of equivalents, at least because none of NLV's Accused Products include a "mouthpiece assembly", and so cannot satisfy this limitation in claim 1 ("[a]n atomizer applicable in an electronic cigarette, comprising...a mouthpiece assembly") or claim 11 ("An electronic cigarette comprising an atomizer, the atomizer comprising... a mouthpiece assembly"). Even Smoore admits as much in its own Complaint filed with this Court, by pleading that NLV's Accused "oil-vaping cartridges" must "be assembled together with mouthpieces to make atomizers". *See* Dkt. 1 at ¶ 20.

136. Furthermore, Smoore has failed to show that any of the NLV C2, C3, C4, or GoodCarts C2 cartridges include “a discharging hole for discharging air inside the liquid reservoir.”

137. To this end, and pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 *et seq.*, NLV requests a judicial determination that making, testing, using, offering for sale, selling, and/or importing into the United States NLV's Accused Products do not infringe any valid and enforceable claim of the '763 Patent.

COUNT III
(Violation of Section 1 of the Sherman Act, 15 U.S.C. § 1)

138. NLV hereby repeats and incorporates by reference each proceeding and succeeding paragraph as though fully set forth herein.

139. Beginning some time before but no later than January 1, 2019, the exact date being unknown to NLV and exclusively within the knowledge of Smoore (the “Conspiracy Period”), Smoore entered into a continuing combination or conspiracy to unreasonably restrain trade and commerce in in violation of Section 1 of the

1 Sherman Act (15 U.S.C. § 1) by artificially reducing or eliminating competition for
2 the pricing of closed cannabis oil vaporizer system products directly sold to United
3 States purchasers.

4 140. In particular, Smoore's unreasonably restrictive distribution agreements
5 constitute agreements in restraint of trade that were entered into for the purpose of
6 combining and conspiring to raise, fix, maintain, or stabilize the prices of closed
7 cannabis oil vaporizer system products sold to purchasers in the United States during
8 the Conspiracy Period.

9 141. As a result of Smoore's and its Co-Conspirators' unlawful conduct and
10 acts taken in furtherance of the conspiracy, prices for closed cannabis oil vaporizer
11 system products sold to purchasers in the United States were raised, fixed,
12 maintained, or stabilized at artificially inflated levels.

13 142. The combination or conspiracy among Smoore and its Co-Conspirators
14 consisted of a continuing agreement, understanding, and concerted action among
15 Smoore and its Co-Conspirators.

16 143. For purposes of formulating and effectuating their combination or
17 conspiracy, Smoore and its Co-Conspirators did those things they combined or
18 conspired to do, including: agreeing to the anticompetitive distribution agreements,
19 policing the agreements through continuous monitoring of the conspiracy and
20 bilateral communications with distributors, and punishing competitive behavior by
21 any distributor attempting to act in a competitive manner.

22 144. As a result of Smoore's anticompetitive and unlawful conduct, NLV has
23 been injured in its business and property in that it has been foreclosed from certain
24 distribution methods, and has incurred higher costs to manufacture and distribute
25 closed cannabis oil vaporizer system products than it otherwise would have incurred
26 in the absence of Smoore's conduct.

27 145. NLV has suffered antitrust injury and damages as a direct result of
28 Smoore's unlawful conduct. NLV's antitrust injury include the higher costs NLV has

1 incurred to manufacture and distribute closed cannabis oil vaporizer system products
2 than it otherwise would have incurred in the absence of Smoore's conduct. NLV's
3 antitrust injury entitles it to bring this count under Section 4 of the Clayton Act, 15
4 U.S.C. § 15, and entitles NLV to recover three times its damages, costs, and
5 reasonable attorney's fees.

6 **COUNT IV**
7 **(Violation of Section 2 of the Sherman Act, 15 U.S.C. § 2)**

8 146. NLV hereby repeats and incorporates by reference each proceeding and
9 succeeding paragraph as though fully set forth herein. The foregoing distribution
10 agreements constitute a series of contracts and/or combinations dictated to Smoore's
11 distributors by Smoore to unlawfully restrain trade by monopolizing the market for
12 closed cannabis oil vaporizer system products in the United States in violation of
13 Section 2 of the Sherman Act.

14 147. Smoore's actions to attempt to enforce the '623 Patent by engaging in
15 sham litigation involving additional patents constitute an abuse of the patent system,
16 as the real goal of this litigation is to attempt to enforce the much broader rights under
17 the '623 Patent, which has been found unenforceable.

18 148. NLV has been harmed by this anticompetitive scheme because Smoore,
19 the much-larger competitor to NLV, has brought suit against NLV in an attempt to
20 force NLV out of the market for closed cannabis oil vaporizer system products
21 through sheer market power due to its unlawful monopolization efforts.

22 149. Competition for closed cannabis oil vaporizer system products,
23 including price competition, has been and will continue to be restrained, suppressed,
24 or eliminated as a result of the anticompetitive conduct described herein.

25 150. Competitors, including potential competitors, have been and will
26 continue to be restrained from vigorously competing with one another for selling
27 closed cannabis oil vaporizer system products.

28 151. As a direct result of the unlawful actions of Smoore, customers of closed

1 cannabis oil vaporizer system products have been deprived of choice and have paid
2 significantly more for closed cannabis oil vaporizer system products than they would
3 have in the absence of the unlawful conduct.

4 152. NLV has suffered antitrust injury and damages as a direct result of
5 Smoore's unlawful conduct. NLV's antitrust injury include the higher costs NLV has
6 incurred to manufacture and distribute closed cannabis oil vaporizer system products
7 than it otherwise would have incurred in the absence of Smoore's conduct. NLV's
8 antitrust injury entitles it to bring this count under Section 4 of the Clayton Act, 15
9 U.S.C. § 15, and entitles NLV to recover three times its damages, costs, and
10 reasonable attorney's fees.

11 **COUNT V**
12 **(Attempted Violations of Section 2 of the Sherman Act, 15 U.S.C. § 2)**

13 153. NLV hereby repeats and incorporates by reference each proceeding and
14 succeeding paragraph as though fully set forth herein.

15 154. As alleged above, Smoore at all times relevant had and continues to have
16 monopoly power in the closed cannabis oil vaporizer system products market, or, at
17 a minimum, a dangerous probability of success in acquiring monopoly power in the
18 closed cannabis oil vaporizer system products market, including the power to control
19 prices and exclude competition.

20 155. As alleged above, Smoore has willfully, knowingly, and with specific
21 intent to do so, attempted to monopolize the closed cannabis oil vaporizer system
22 products market.

23 156. Smoore's anticompetitive conduct alleged above has been directed at
24 accomplishing the unlawful objective of controlling prices and/or preventing
25 competition in the closed cannabis oil vaporizer system products market. Smoore's
26 ongoing anticompetitive conduct presents a dangerous probability that Smoore will
27 succeed, to the extent it has not already done so, in its attempt to monopolize the
28 closed cannabis oil vaporizer system products market.

157. Smoore’s anticompetitive conduct alleged above does not reasonably accomplish any procompetitive goals, any procompetitive benefits are outweighed by anticompetitive harm, and/or there are less restrictive alternatives by which Smoore would be able to reasonably achieve any procompetitive goals.

158. NLV has suffered antitrust injury and damages as a direct result of Smoore's unlawful conduct. NLV's antitrust injury include the higher costs NLV has incurred to manufacture and distribute closed cannabis oil vaporizer system products than it otherwise would have incurred in the absence of Smoore's conduct. NLV's antitrust injury entitles it to bring this count under Section 4 of the Clayton Act, 15 U.S.C. § 15, and entitles NLV to recover three times its damages, costs, and reasonable attorney's fees.

COUNT VI
(Violation of California Cartwright Act-California Business and Professions
Code, §§ 16700, *et seq.*)

159. NLV hereby repeats and incorporates by reference each proceeding and succeeding paragraph as though fully set forth herein.

160. During the Conspiracy Period, Smoore and their co-conspirators entered into and engaged in a continuing unlawful trust in restraint of the trade and commerce described above in violation of Section 16720, California Business and Professions Code. Smoore has acted in violation of Section 16720 to fix, raise, stabilize, and maintain prices of, and allocate markets for, closed cannabis oil vaporizer system products at supra-competitive levels.

161. The aforesaid violations of Section 16720, California Business and Professions Code, consisted, without limitation, of a continuing unlawful trust and concert of action among Smoore and their co-conspirators, the substantial terms of which were to fix, raise, maintain, and stabilize the prices of, and to allocate markets for, closed cannabis oil vaporizer system products.

162. For the purpose of forming and effectuating the unlawful trust, Smoore

1 and their co-conspirators have done those things which they combined and conspired
2 to do, including but not limited to the acts, practices and course of conduct set forth
3 above and the following: (1) fixing, raising, stabilizing, and pegging the price of
4 closed cannabis oil vaporizer system products; and (2) entering into restrictive
5 distribution agreements that constitute unlawful and/or coercive agreements to fix,
6 raise, stabilize, and maintain resale prices of closed cannabis oil vaporizer system
7 products in violation of California law; and (3) allocating among themselves the
8 customers of closed cannabis oil vaporizer system products.

9 163. The combination and conspiracy alleged herein has had, inter alia, the
10 following effects: (1) price competition in the sale of closed cannabis oil vaporizer
11 system products has been restrained, suppressed, and/or eliminated in the State of
12 California; (2) prices for closed cannabis oil vaporizer system products sold by
13 Smoore and their co-conspirators have been fixed, raised, stabilized, and pegged at
14 artificially high, non-competitive levels in the State of California and throughout the
15 United States; and (3) those who purchased closed cannabis oil vaporizer system
16 products have been deprived of the benefit of free and open competition.

17 164. As a direct and proximate result of Smoore's unlawful conduct, NLV
18 was injured in its business and property in California in that NLV was foreclosed
19 from an important distribution stream and was foreclosed from competing in a
20 competitive market for closed cannabis oil vaporizer system products in California.
21 As a result of Smoore's violation of the Cartwright Act, NLV seeks treble damages
22 and its cost of suit, including a reasonable attorney's fee, pursuant to Section
23 16750(a) of the California Business and Professions Code.

24 **COUNT VII**
25 **(Infringement of the '294 Patent)**

26 165. NLV incorporates by reference the allegations contained in all
27 preceding paragraphs of these counterclaims.

28 166. Upon information and belief, Smoore has been and is still infringing,

1 contributing to infringement, and/or inducing others to infringe the '294 Patent at
2 least by making, testing, using, offering for sale, importing, and/or selling products
3 that practice the '294 Patent, without authority or license. Smoore's infringing
4 Accused Products include, but are not limited to, at least packages of CCELL Snap-
5 Fit cartridges and mouthpieces; packaging of CCELL Press-Fit cartridges and
6 mouthpieces; packages of CCELL All-In-One devices and mouthpieces; and
7 Capping Presses to affix CCELL cartridges and mouthpieces, as demonstrated in the
8 exemplary infringement claim chart attached hereto as Exhibit 3.

9 167. Upon information and belief, Smoore has had knowledge of the '294
10 Patent at least as of the filing of this counterclaim, if not before, through a former
11 NLV employee that left NLV to join Smoore in November 2023. This employee was
12 hired by NLV in October 2023, and while at NLV received extensive training on
13 NLV's product offerings, and NLV's intellectual property. This included training
14 pertaining specifically to NLV's product covered by the '294 Patent. On information
15 and belief, this employee had knowledge of NLV's '294 Patent. After receiving such
16 training and knowledge, this employee left NLV to join Smoore in November 2023.
17 Smoore actively, knowingly, and intentionally induces others, including its
18 customers and end users, to infringe one or more claims of the '294 Patent by
19 encouraging and facilitating others to perform actions that Smoore knows to be acts
20 of infringement of the '294 Patent, and with the intent that those performing the acts
21 infringe the '294 Patent, or with willful blindness to such infringement. This is
22 demonstrated by Smoore's instructions, including production and public posting of
23 promotional videos that instruct how to use Smoore's Accused systems and
24 packaging, and were made with the help of this former NLV employee. Smoore's
25 videos on its Accused systems were posted on its YouTube account in May 2024,
26 just 2.5 weeks after NLV posted its promotional videos pertaining to NLV's product
27 covered by the '294 Patent. Notably, this former NLV employee is the featured
28 instructor in each of Smoore's instructional videos promoting Smoore's Accused

1 systems.

2 168. As a direct and proximate result of Smoore's acts of infringement, NLV
3 has been damaged in an amount not yet determined, including but not limited to lost
4 profits, price erosion, lost convoyed sales, and, in no event, less than a reasonable
5 royalty and/or the additional remedies defined by 35 U.S.C. § 289.

6 169. NLV has been irreparably harmed by Smoore's infringing activities, and
7 NLV will continue to be irreparably harmed by such activities in the future unless
8 those infringing activities are enjoined by this Court because, among other things,
9 NLV and Smoore directly compete for sales of cartridge capping jig systems.

10 **PRAYER FOR RELIEF**

11 NLV respectfully requests that the Court enter judgment in its favor and against
12 Smoore as follows:

- 13 A. Dismissing with prejudice all of Smoore's claims against NLV;
- 14 B. Denying all relief that Smoore seeks in its Complaint against NLV;
- 15 C. Ruling in favor of NLV on all of NLV's affirmative defenses;
- 16 D. Entering judgment in NLV's favor on each cause of action in the
17 counterclaims;
- 18 E. Granting an injunction and enjoining Smoore and its officers, agents,
19 servants, employees, attorneys, and all others in active concert and/or
20 participation with Smoore from infringing the '294 Patent through the
21 manufacture, use, test, importation, offer for sale, and/or sale of
22 infringing products;
- 23 F. Awarding NLV for compensatory and trebled damages to be proven at
24 trial; including for any infringement and enhanced damages pursuant to
25 35 U.S.C. § 284;
- 26 G. Awarding NLV for disgorgement of unjust enrichment;
- 27 H. Awarding NLV punitive damages in an amount to be proven at trial;
- 28 I. Awarding NLV their expenses and costs in accordance with Rule 54(d)

of the Federal Rules of Civil Procedure;

J. Awarding NLV attorney's fees including under 35 U.S.C. § 285;

K. Awarding NLV prejudgment and post-judgment interest; and

L. Awarding NLV any other relief that the Court deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(b), NLV demands a trial by jury on all issues so triable.

Dated: October 3, 2024

Respectfully submitted,

BRYAN CAVE LEIGHTON PAISNER LLP

By: /s/ Kristin S. Webb

Kristin S. Webb

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